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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1621

JOHN DIOGUARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1631

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) [1] is reported at 492 F. 2d 70.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1974. Upon timely application, Mr. Justice

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[1] "Pet. App." refers to the appendix in No. 73-1621. The three volumes that were designated "Appellants' Appendix" in the court of appeals are referred to as "App."

Marshall extended the time for filing a petition for a writ of certiorari to April 30, 1974. The petitions for writs of certiorari were filed on April 27, 1974 (No. 73-1621) and April 30, 1974 (No. 73-1631). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a post-trial letter from a juror urging petitioner Dioguardi to repent and claiming, *inter alia*, that the writer possessed clairvoyant powers is sufficient to justify an inquiry into that juror's mental competence at trial.

2. Whether in the circumstances of this case the government's summation comment on the failure of the defense to produce witnesses to contradict the factual content of its case constituted a comment on the petitioners' failure to testify on their own behalf.

3. Whether in the circumstances of this case two different unlawful stock purchases could provide a basis for two separate counts in the indictment and separate and consecutive penalties.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York,[2] petitioners were convicted on a multi-count indictment charging violations of

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[2]Of the seven other defendants named in the indictment, three pleaded guilty, three were tried jointly at a separate trial, and one pleaded guilty in a related case. See *United States* v. *Greenberg*, No. 72-2368 (C.A. 2), affirmed from the bench, February 16, 1973.

federal securities laws (15 U.S.C. 77q(a), 77x, 78j(b) and 78ff), Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. 240.10b-5),[3] the federal wire and mail fraud statutes (18 U.S.C. 1341 and 1343) and the federal conspiracy statute (18 U.S.C. 371). Petitioner Ostrer was convicted on eleven counts of the indictment; he was sentenced to ten concurrent terms of imprisonment ranging from two to three years, and fined $55,000.[4] Petitioner Dioguardi was convicted on four counts of the indictment; he was sentenced on two counts to terms of five years' imprisonment, one of which was suspended, and sentenced on two other counts to terms of two years imprisonment. The sentences were to run consecutively. He was also fined $30,000.

The facts of this case were thoroughly discussed in the opinion of the court of appeals. Briefly, they show a scheme to manipulate the price of the stock of Belmont Franchising Corporation upward from five to fifty dollars per share during a five month period in 1970.

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[3] Under the Securities Act of 1933, 15 U.S.C. 77a, 77aa, section 77q(a) prohibits fraud in the sales of securities. Violations of this section are punishable under Section 77x. Rule 10b-5, promulgated under 15 U.S.C. 78j(b), Securities Exchange Act of 1934, prohibits fraud in the purchase and sale of securities. Violations of this rule are punishable under 15 U.S.C. 78ff.

[4] On count 36, Ostrer was sentenced to five years' imprisonment. The sentence was suspended and he was placed on probation for one day.

In January of 1970, Anthony Soldano and Fred Goodman, acting in concert with Michael Hellerman,[5] began to acquire substantially all of the publicly tradeable shares of Belmont in the hope of creating the appearance of an active public market in the stock at approximately five dollars per share. Hellerman promised Soldano and Goodman that he and his associates would purchase the stock from them once they had succeeded in acquiring all of the Belmont stock and raising the price of a share to fifteen dollars. Hellerman planned a further upward manipulation of the stock from fifteen dollars.

In furtherance of the stock manipulation scheme, petitioner Ostrer agreed to place purchase orders for Belmont stock. In turn, he expected to reap large profits after brokers were paid off to sell the shares at much higher prices to their customers. The market collapsed, however, before these expectations could be realized.

Petitioner Dioguardi arranged for Ostrer to obtain a loan with which to purchase a number of shares. Hellerman and Dioguardi had an agreement whereby Dioguardi would receive twenty per cent of whatever Hellerman made from this scheme. On one occasion, Dioguardi was given $30,000 by Hellerman.

At trial, Dioguardi called no witnesses but sought on cross-examination to impeach the credibility of the government's chief witnesses, who were petitioners' accomplices. Ostrer did not testify but called two witnesses whose testimony indicated that Ostrer had been victimized by Hellerman (Pet. App. 7a-11a).

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[5] Hellerman later pleaded guilty and testified for the government.

About ten days after the trial, Dioguardi received a letter from one of the jurors, Miss Genena Rush, urging him to repent. The letter contained, *inter alia*, references to clairvoyance and astrology (Pet. App. 11a, n.7).

ARGUMENT

1. Petitioners contend that the trial court erred in denying their request for an inquiry into the mental competence of a juror who wrote petitioner Dioguardi a letter after trial urging him to repent and stating, *inter alia*, that she possessed clairvoyant powers. They claim that their right under 28 U.S.C. 1865(b)(4) to a jury of persons not "* * * incapable, by reason of mental * * * infirmity, to render satisfactory jury service" was thus violated. The court of appeals correctly rejected this contention. As it observed (Pet. App. 17a):

> It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist.[6]

The purpose of this rule is to protect jurors from harassment, to preserve the sanctity of the jury room, and to prevent jury tampering, uncertain verdicts, and a flood of frivolous petitions. See *Stein* v. *New York*, 346 U.S. 156, 178; *McDonald* v. *Pless*, 238 U.S. 264, 268; *Miller* v. *United States*, 403 F. 2d 77, 82 (C.A. 2).

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[6]Judge Feinberg, dissenting, "heartily endorse[d]" the majority's position that there must be "substantial if not wholly conclusive evidence" of a juror's incompetence during trial before a post-verdict inquiry is ordered (Pet. App. 32a). He took issue only with the majority's conclusion that such evidence did not exist in this case.

Because it is significantly more intrusive and less likely to turn on objective evidence than other sorts of jury probes, a competency inquiry offers unprecedented opportunities to harass, humiliate, and intimidate individual jurors.[7] Consequently, as the court of appeals noted (Pet. App. 19a-20a):

> * * * [c]ourts have refused to set aside a verdict, or even to make further inquiry, unless there [has been] * * * proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial. [Footnotes omitted.]

Although no evidence of an insanity adjudication was adduced, the court of appeals did not rest its decision upon this standard, as petitioners claim.[8] Instead, the court chose to stress the heavy burden of proof attending a request for an inquiry and concluded that "[n]o evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication of insanity or incompetence" (Pet. App. 21a).

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[8]Petitioner Ostrer erroneously asserts that the decision of the court of appeals was "premised on the assumption that the mental infirmity disqualification of 28 U.S.C. §1865 applied only to mentally

In support of their request for a competency hearing, petitioners rely almost entirely[9] on a post-trial letter allegedly written by the juror to petitioner Dioguardi and the analyses of that letter by seven different psychiatrists. The analyses were based, however, on an erroneous version of the letter. The copies provided by defense counsel stated " * * * I cannot *admit* what appear before me when I was on the jury bench," instead of correctly stating " * * * I cannot *omit* what appear before me when I was on the jury bench" (Pet. App. 11a, n. 7, see also n. 8; emphasis added). The mistranscription was crucial, since the mistake constituted the only concrete evidence in the letter that the juror had hallucinated at trial. Five of the seven psychiatrists consulted expressly relied on this error as evidence of hallucinations during trial, as well as

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ill persons who have been formally adjudicated as 'insane' or 'incompetent' and that a convicted defendant may not obtain a new trial if he discovers shortly after the verdict that one (or presumably several) of his jurors were mentally ill, so long as they were never formally adjudicated as insane" (Pet. No. 73-1631, p. 14). Petitioner Dioguardi further misreads the opinion below by claiming: "The opinion holds that no showing of mental infirmity, except proof of a *contemporaneous* adjudication of mental incompetence, ever warrants inquiry into whether a juror was mentally unqualified during trial * * * " (emphasis added) (Pet. No. 73-1621, p. 10).

[9]The only other suggestion of mental incompetence adduced by petitioners is the contention, raised for the first time in this Court, that when the juror in question stated on voir dire that she was a "patient attendant" at Flower Fifth Avenue Hospital, she did not mean a "nurse's aide" but a mental patient who worked part-time attending other patients. There is no evidence to support a conclusion that Flower Fifth Avenue was a mental hospital or that the juror was a mental patient there. This speculation, which is unsupported by the record before this Court, can afford no basis for relief here. Petitioners' remedy, if any, must be before the district court.

evidence of mental illness in general,[10] while the analysis of a sixth was influenced by it.[11] Ironically, had the sentence been accurately reproduced it would have provided strong evidence of mental incompetence. In the context of the letter, it is a statement by the juror that she could not ignore the evidence at trial despite her sympathy for Dioguardi.

Moreover, as the court of appeals observed, the psychiatric studies of the letter were "essentially horseback uninformed opinions" (Pet. App. 17a). The psychiatrists evaluated the juror's mental state at trial on the basis of

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[10] Dr. Stanley Portnow stated in an affidavit:

> Perhaps the most significant statement in the letter concerning the juror's state of mind during the course of the trial is as follows: "As I stated I cannot admit what appear before me, when I was on the jury bench." We have here an admission that the juror visually hallucinated during the course of trial [App. 1065-66].

Dr. Robert W. Damino also attached great importance to this statement:

> The content of the letter of Gemena Rush indicates very definitely that this woman was in a delusional state while serving on the jury: "As I stated I cannot admit what appear before me, when I was on the jury bench." This single statement alone, even in the absence of a large amount of other psychodynamic evidence, indicates that Gemena Rush could not properly evaluate evidence or make any kind of logical connections in regard to the evidence when she was serving on the jury [App. 1072].

Dr. Damino further asserted that the statement was evidence that "her decision for conviction may very well have been a decision of convicting herself because of guilt regarding her own activities, rather than any activities of the accused." [App. 1072.]

[11] Dr. Jerry C. Atkins did not discuss any of the letter's statements, but referred to the "visions" the juror had during trial (App. 1073). The erroneous statement in the letter is the only possible basis for a conclusion that the juror hallucinated at that time.

the letter alone.[12] Although free to provide their psychiatrists with information regarding the trial, its issues, and the juror's background, appearance, and in-court behavior, petitioners apparently failed to do so. Without such information, the letter's tone, language, references, or structure cannot be fairly and properly evaluated.

Further, several of the analyses show evidence of having been hastily conceived. Only one of the analyses, that of Dr. Portnow, was in affidavit form; the others were simply letters. Doctors Zucker, Atkins, and Karlan set forth their conclusions without discussing the evidence in detail or indicating the theories on which their findings were based. Few of the psychiatrists showed any knowledge of the purpose their studies were to serve.

The letter, moreover, is itself evidence of mental competence. It clearly indicates that days after the trial the juror could still recall key witnesses and points of evidence. Touched by his ordeal, the juror wrote to petitioner Dioguardi to offer him encouragement and to suggest that through repentance he would find salvation. Her expressed belief in clairvoyance, curses and astrology was not evidence of mental derangement, but indicative of a deeply religious and superstitious person with little formal education. The letter thus provides no evidence that the juror could not understand the proceedings and participate in the deliberations.

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[12] Apparently only Dr. Stanley Portnow was provided with additional information. His affidavit states that he had the opportunity to read the government's memorandum opposing the motion for a new trial (App. 1062).

The juror's behavior at trial, in fact, left a strong impression of mental competence. As the trial judge observed (Pet. App. 50a-51a):

> [T]here was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict [footnote omitted]. In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors.

In sum, petitioners' right to a jury of persons of sufficient mental competence "to render satisfactory jury service" under 28 U.S.C. 1865(b)(4) was not shown to have been violated, and they failed to adduce sufficient evidence to justify a mental competency inquiry.

2. Petitioners next contend that the prosecution's comment on their failure to call witnesses to rebut the factual content of the government's case violated their Fifth Amendment right to remain silent, since, they claim, they alone could have given contradicting testimony. This contention was fully discussed and correctly rejected by the court of appeals (Pet. App. 22a-24a).

In contrast to the cases relied on by petitioner (see *United States* v. *Flannery*, 451 F. 2d 880, 881-882 (C.A. 1); *United States* v. *Handman*, 447 F. 2d 853, 855 (C.A. 7)), the comment in question was, as the court of appeals declared, "neutralized" by "a prompt, corrective instruction" given by the trial court (Pet. App. 23a). The court also noted that unlike *Handman*, where the defendant was implicated solely by an informer's testimony about a telephone conversation between himself and the defendant, "this was not the close situation in which it was a question of the defendant's word against the word of one other" (*ibid.*). Finally, the court concluded that, given the scope of the operation, the large number of people involved, and the meetings "at which more were present than the defendants and the government's witnesses," witnesses could have been called to testify "or at least that in many other ways defendants could have waged factual war with the detailed evidence of the government's witnesses" (*ibid.*).

The prosecutor's statement, therefore, did not constitute an improper comment on the petitioners' failure to testify, and there is no conflict among the circuits on this issue.

3. Finally, petitioner Dioguardi contends that the trial court improperly imposed separate and consecutive penalties on him for the violations in counts 16 and 17, which he claims were part of a single transaction. This contention was fully discussed and correctly rejected by the court below (Pet. App. 26a-27a).

Count 16 involved the confirmation of the purchase in petitioner Ostrer's name of 2,000 shares of Belmont stock through Bruce & Co. on March 10, 1970; Count 17 involved confirmation of a similar purchase through Kelsey & Co. on the next day. Dioguardi argues that the

purchases and their confirmations should be treated as a single transaction in which Ostrer was attempting to purchase half of the outstanding shares of Belmont stock (Pet. 19-22). As the court of appeals observed, however, the debate over "whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud" has been resolved "in favor of the position that each transaction in a securities fraud case constitutes a separate offense" (Pet. App. 26a). See *United States* v. *Sanders*, 415 F. 2d 621 (C.A. 5), certiorari denied, 397 U.S. 976; see also *United States* v. *Binstock*, 37 F.R.D. 13 (S.D.N.Y.). In so ruling, it recognized that the unlawful acts described in counts 16 and 17 were fraudulent not only with respect to the scheme as a whole, but with respect to the investing public as well. Each of the purchases created the appearance of an active rising market in Belmont stock for the purpose of inducing members of the public to buy (App. 17).

As the court of appeals concluded, "[a]lthough a situation can be envisioned in which consecutive sentences on multiple fraud convictions would be questionable," the sequence of sentences imposed here on petitioner Dioguardi lay "within the [sound] discretion of the trial court" (Pet. App. 27a). See *United States* v. *Sanders*, *supra*, 415 F. 2d at 626.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1974.